Dayang Khatijah bt Jahan & Ors v Pentadbir Tanah Daerah Seberang Perai Utara Pulau Pinang

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO PA-24NCVC-927–10 OF 2017
LIM CHONG FONG J
3 MARCH 2018

Civil Procedure — Preliminary objection — Affidavit in reply filed out of time — Land administrator refused to remove caveat — Plaintiffs filed application for removal of caveat under s 418 of the National Land Code — Whether defendant filed affidavit in reply out of time — Whether curable — Whether plaintiffs did not object to late filing on earliest opportune — Whether there was substantial miscarriage of justice

Land Law — Caveats — Removal of — Land administrator refused to remove caveat — Plaintiffs filed application for removal of caveat under s 418 of the National Land Code — Whether there was reasonable ground for entry of registrar's caveat — Whether caveat ought to be removed — Whether there was fraud or improper dealing — National Land Code s 418

The plaintiffs were the co-proprietors of a piece of land located in Seberang Perai Utara, Pulau Pinang ('the land') whereas the defendant was the district land administrator. The original proprietor of the land was one Mariam bt Yahaya who died on 17 February 2014. On 2 October 2014, the defendant entered registrar caveat on the land. The plaintiffs applied for removal of caveat but the same was refused by the defendant. Consequently, the plaintiffs filed the present action for removal of caveat under s 418 of the National Land Code ('the Code'). The plaintiffs submitted that they were prejudiced by the subsistence of the registrar's caveat because their application to court for subdivision of the land could not be completed as the result. The defendant in rebuttal referred to Form 19F of the Code dated 2 October 2014 which stated that there was a fraud in the instrument of transfer of the land whereby the original proprietor had died on 17 January 2014, but her signature dated 17 February 2014 was found on the said instrument. The plaintiffs had also raised preliminary objection that the defendant's affidavit in reply was filed late. In reply, the defendant contended that the plaintiffs did not object to the allegedly late filing of the defendant's affidavit during the final case management.

Held, dismissing the plaintiffs' action with costs of RM1,000:

(1) The plaintiffs' objection which was made only in the written submission was not raised on the earliest opportune time. The plaintiffs had thus waived the alleged non-compliance. More pertinently, there was no substantial miscarriage of justice caused to the plaintiff that could not be cured for admitting the defendant's affidavit in evidence. Based on the above finding, the court overruled the plaintiffs' preliminary objection (see paras 17–19).

(2) In the circumstances of the case and based on the grounds as stated in Form 19F of the Code dated 2 October 2014, there was reasonable ground for the entry of the registrar's caveat in the land. A deceased person could not have executed instruments of transfer of the land subsequent to her death as had happened in the present case. Several of the transfers benefitted several of the plaintiffs making them now registered proprietors. Unless satisfactorily explained, this prima facie smacked of fraud or improper dealing (see para 29).

(3) The plaintiffs either had to await the completion of the police investigations in their favour or they had to otherwise file a civil action in court to declare that they were the lawful registered proprietors of the land. The plaintiffs had not averred in their affidavit that the police investigations had concluded the investigations in their favour. Alternatively, the plaintiffs had also not yet initiated the aforesaid civil suit. The filing of the action here was thus premature (see para 32).

[Bahasa Malaysia summary

Plaintif-plaintif adalah pemilik bersama sebidang tanah yang terletak di Seberang Perai Utara, Pulau Pinang ('tanah tersebut') manakala defendan adalah pentadbir tanah daerah. Pemilik asal tanah tersebut adalah Mariam bt Yahaya yang telah meninggal dunia pada 17 Februari 2014. Pada 2 Oktober 2014, defendan telah memasuki daftar kaveat ke atas tanah tersebut. Plainitf-plaintif telah memohon pembatalan kaveat itu tetapi yang sama telah ditolak oleh defendan. Berikutan itu, plaintif-plaintif telah memfailkan tindakan ini untuk pembatalan kaveat di bawah s 418 Kanun Tanah Negara ('Kanun tersebut'). Plaintif-plaintif berhujah bahawa mereka diprejudiskan oleh kewujudan kaveat pendaftar kerana permohonan mereka kepada mahkamah untuk pembahagian kecil tanah tersebut tidak dapat diselesaikan akibat itu. Defendan dalam pematahan merujuk kepada Borang 19F Kanun tersebut bertarikh 2 Oktober 2014 yang menyatakan bahawa terdapat fraud dalam surat pemindahan tanah di mana pemilik asal telah meninggal dunia pada 17 Januari 2014, tetapi tandatangannya bertarikh 17 Februari 2014 telah didapati pada instrumen tersebut. Plaintif-plaintif juga menimbulkan bantahan awal bahawa afidavit jawapan defendan telah difailkan lewat. Dalam jawapannya, defendan berhujah bahawa plaintif-plaintif tidak membantah kepada afidavit defendan yang dikatakan telah difailkan lewat semasa pengurusan kes akhir.

Diputuskan, menolak tindakan plaintif-plaintif dengan kos RM1,000:

(1) Bantahan plaintif-plaintif yang hanya telah dibuat dalam penghujahan bertulis tidak ditimbulkan pada masa peluang terawal. Oleh itu, plaintif-plaintif telah mengetepikan ketidakpatuhan yang dikatakan itu. Lebih penting lagi, tiada pelaksanaan ketidakadilan yang substantial diakibatkan ke atas plaintif yang tidak boleh dipulihkan kerana menerima masuk afidavit keterangan defendan. Berdasarkan dapatan di atas, mahkamah telah menolak bantahan awal plaintif-plaintif (lihat perenggan 17–19).

(2) Dalam keadaan berikut dan berdasarkan alasan sepertimana dinyatakan dalam Borang 19F Kanun tersebut bertarikh 2 Oktober 2014, terdapat alasan munasabah untuk kemasukan kaveat pendaftar ke atas tanah tersebut. Si mati tidak mungkin telah menyempurnakan instrumen pemindahan tanah tersebut selepas kematiannya sepertimana yang berlaku dalam kes ini. Beberapa pemindahan yang memberi manfaat kepada beberapa plaintif-plaintif yang menjadikan mereka sekarang pemilik-pemilik berdaftar. Kecuali dijelaskan dengan meyakinkan, ini secara prima facie adalah urus niaga berunsur fraud atau tidak wajar (lihat perenggan 29).

(3) Plaintif-plaintif sama ada perlu menunggu selesai siasatan polis menyebelahi mereka atau mereka sebaliknya perlu memfailkan tindakan di mahkamah untuk mengisytiharkan bahawa mereka adalah pemilik-pemilik berdaftar sah tanah tersebut. Plaintif-plaintif tidak menegaskan dalam afidavit mereka bahawa siasatan polis telah membuat kesimpulan siasatan yang menyebelahi mereka. Secara alternatif, plaintif-plaintif juga masih belum memulakan guaman sivil. Pemfailan tindakan di sini adalah pramatang (lihat perenggan 32).]

Notes

For a case on affidavit in reply filed out of time, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) para 8110.

For cases on removal of caveat, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2775–2786.

Cases referred to

Agrimal Project Sdn Bhd v Pendaftar Hakmilik, Pejabat Tanah Dan Galian, Johor & Ors [1998] 5 MLJ 673, HC (refd)

Kiu Su Sieng & Ors v Registrar of Lands and Surveys Kuching Division [2016] 11 MLJ 376; [2016] 2 CLJ 959, HC (distd)

Motif Unik Sdn Bhd v Khoo Ah Soon & Anor [2011] MLJU 1547; [2012] 10 CLJ 612, HC (distd)

Pembinaan Batu Jaya Sdn Bhd v Pengarah Tanah dan Galian, Selangor & Anor [2016] 2 MLJ 495; [2016] 5 CLJ 250, CA (refd)

A *Pendaftar Hakmilik Negeri Kedah v Oversea-Chinese Banking Corp Ltd* [1991] 2 MLJ 177; [1991] 2 CLJ 1105, SC (refd)
Registrar of Titles, Johore v Temenggong Securities Ltd [1976] 2 MLJ 44, PC (refd)
Taipan Focus Sdn Bhd v Tunku Mudzaffar b Tunku Mustapha [2011] 1 MLJ
B 441; [2011] 1 CLJ 133, FC (refd)

Legislation referred to

National Land Code ss 12(1), 320, 321, 340(2)(a), (2)(c), (4), 418, Form 19F
C Rules of Court 2012 O 28 r 3C(4)

Azhar bin Ahmad (Aswar Simon & Azhar) for the plaintiffs.
Azlena bt Hashim (State Legal Advisor, Penang State Legal Advisor's Office) for the defendant.
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Lim Chong Fong J:

INTRODUCTION

E **[1]** This is an appeal to remove the registrar's caveat under s 418 of the National Land Code.

[2] The plaintiffs are individuals and the registered co-proprietors of the
F land described as GM 3820 Lot 4100 Mukim 03 Daerah Seberang Perai Utara Pulau Pinang ('land').

[3] The defendant is the district land administrator appointed pursuant to s 12(1) of the National Land Code ('the NLC').

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BRIEF FACTS

[4] The original proprietor of the land is Mariam bt Yahaya who died on 17 January 2014.

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[5] The first, second, third, sixth and ninth plaintiffs are registered as co-proprietors as the result of the presentations of transfer of ownership of parts of the land from Mariam bt Yahaya on 15 April 2014. There were also three other presentations of transfer of parts of the land by Mariam bt Yahaya to
I Hartini bt Abdul Rahim, Mohd Subuki bin Fadzil and Ahmad Rasfan bin Hj A Rahman on the same day.

[6] The district land administrator on 2 October 2014 vide presentation No 0702B2014001300 entered the registrar's caveat on the land.

[7] A Marlia bt Mohd Belia who claimed to be beneficiary of the estate of Mariam bt Yahaya filed Penang High Court Originating Summons Nos 24NCVC-167–02 of 2015 and PA-24NCVC-953–10 of 2016 on 27 February 2015 and 19 October 2016 against the plaintiffs respectively. However both the aforesaid originating summons were struck off.

[8] The plaintiffs then on 7 February 2017 filed Penang High Court Originating Summons No PA-24NCVC-119–02 of 2017 against the defendant and the State Director of Land and Mines appealing against the rejection of the plaintiffs' application for subdivision of the land.

[9] The plaintiffs then by letter dated 3 August 2017 wrote to the defendant to remove the registrar's caveat on the land. The defendant by letter dated 28 August 2017 replied declining to do so.

[10] As the result, the plaintiffs filed this originating summons ('OS') on 27 October 2017. The affidavits filed for the purposes of this OS are as follows:

(a) the plaintiffs' affidavit in support affirmed by Mohd Azhar bin Bakar dated 6 November 2017; and

(b) the defendant's affidavit in reply affirmed by Rozila bt Zulkifly dated 15 December 2017.

[11] After having read the written submission filed by the parties, I heard counsel on 26 January 2018. I thereafter dismissed the OS with costs of RM1,000.

[12] The plaintiffs are dissatisfied with my decision and have on 22 February 2018 filed their appeal to the Court of Appeal.

[13] Consequently, I hereby furnish below the grounds of my decision.

PRELIMINARY OBJECTION

[14] The plaintiffs raised a preliminary objection that the defendant's affidavit in reply was filed late beyond 1 December 2017 as directed by the court pursuant to O 28 r 3C(4) of the Rules of Court 2012. The defendant's affidavit in reply was only sent to the plaintiffs' solicitor by post and facsimile on 18 December 2017.

[15] According to the defendant, the plaintiffs did not object to the allegedly late filing of the defendant's affidavit during the final case management session before the deputy registrar on 19 December 2017. The purpose of that case

A management was to ensure that all cause papers are filed and in order. The plaintiffs merely stated that they did not wish to file a further affidavit in reply on that day.

B **[16]** I have reviewed the court file but did not see any minutes recording that the defendant had been directed to file the defendant's affidavit in reply by 1 December 2018. Moreover as argued by the defendant, the plaintiffs did not raise their objection on the alleged irregularity in the filing service and service of the defendant's affidavit in reply during the final case management session on 19 December 2017.

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[17] In the circumstances, I am of the view that the plaintiffs' objection which was made only in their written submission wasn't raised on the earliest opportune time after the plaintiffs became aware of the non compliance of the D alleged directions by the court. In other words, the plaintiffs have waived their alleged non-compliance.

[18] More pertinently, I cannot see any substantial miscarriage of justice caused to the plaintiffs that could not be cured for admitting the defendant's E affidavit in evidence. The plaintiffs themselves had stated that they do not wish to reply to the defendant's affidavit in reply.

[19] Consequently I overrule the plaintiffs preliminary objection

F SUBSTANTIVE CONTENTIONS AND FINDINGS

[20] The plaintiffs contended that by the district land administrator's letter dated 28 August 2017, the registrar's caveat was not removed because the land G administrator was not empowered to do so as requested by the plaintiffs in their letter dated 3 August 2017. The material part of the aforesaid letter reads as follows:

> 2. Dimaklumkan bahawa pentadbiran ini tidak mempunyai kuasa untuk membatalkan Kaveat Pendaftar ke atas hartanah tersebut. Sehubungan itu, mohan H pihak tuan mendapatkan Perintah Mahkamah untuk membatalkan kaveat berkenaan selaras dengan Seksyen 321(3)(c) KTN 1965.

[21] Thus the plaintiffs filed this OS but is perplexed that the defendant again objected to it. According to the plaintiffs, they were prejudiced by the I subsistence of the registrar's caveat because their application to court for subdivision of the land could not be completed as the result. The registrar's caveat has been in subsistence in excess of three years and the challenges to the ownership of the land by Marlia bt Mohd Belia had twice been struck off by the court.

[22] Consequently, the plaintiffs contended that the registrar's caveat ought to be forthwith removed generally following the Court of Appeal case of *Pembinaan Batu Jaya Sdn Bhd v Pengarah Tanah dan Galian, Selangor & Anor* [2016] 2 MLJ 495; [2016] 5 CLJ 250 and specifically following the Penang High Court case of *Motif Unik Sdn Bhd v Khoo Ah Soon & Anor* [2011] MLJU 1547; [2012] 10 CLJ 612.

[23] The defendant in rebuttal referred to Form 19F of the NLC dated 2 October 2014 pertaining to the entry of the registrar's caveat on the land. It states as follows:

> Terdapat unsur penipuan dalam instrumen urusniaga pindahmilik tanah (14A). Pemindahmilik iaitu Mariam binti Yahaya telah meninggal dunia pada 17 Januari 2014 namun terdapat tandatangan simati bertarikh 17 Februari 2014 di dalam Instrumen Urusniaga Pindahmilik Tanah (14A) melibatkan 6 perserahan dan pada 15 April 2014 satu lagi perserahan.

[24] The defendant further stated that a police report was lodged on 3 September 2014. However the defendant has yet to receive information on the outcome of the investigations thereto.

[25] Therefore the defendant clarified that the district land administrator's letter dated 28 August 2017 cannot be construed merely to mean that there was lack of power by the land administrator procedurally to remove the caveat and that the court would hence automatically remove it upon the application of the plaintiffs. I read the district land administrator's letter to mean that there is a reason for the subsistence of the registrar's caveat that required adjudication by the court if the caveat is to be removed.

[26] The relevant law on entry and removal of registrar's caveat is encapsulated in ss 320 and 321 of the NLC as follows:

> 320 Circumstances in which Registrar's caveats may be entered
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> (1) Subject to sub-section (2), a Registrar's caveat may be entered in respect of any land wherever such appears to the Registrar to be necessary or desirable-
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> (a) for the prevention of fraud or improper dealing; or
>
> (b) for protecting the interests of —
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> (i) *the Federation or the State Authority, or*
>
> (ii) *any person who is in his opinion under the disability of minority, mental disorder or unsoundness of mind, or is shown to his satisfaction to be absent from the Federation; or*

A (ba) for securing that the land will be available to satisfy the whole or part of any debt due to the Federation or the State Authority, whether such debt is secured or unsecured and whether or not judgement thereon has been obtained; or

B (c) *by reason of some error appearing to him to have been made in the register or issue document of title to the land or any other instrument relating thereto.*

(2) Knowledge by the Registrar of the fact that any land or interest therein has been acquired, or is to be held, by any person or body in a fiduciary capacity shall not of itself constitute a ground for entering a Registrar's caveat in respect of that land.

C 321 Procedure with respect of Registrar's caveat and duration thereof

(1) A Registrar's caveat shall be in Form 19F and the entry of a Registrar's caveat on any document of title shall be effected by the endorsement thereon, under the hand and seal of the Registrar, of the words 'Registrar's Caveat Entered', together with a statement of the time of entry.

D (2) As soon as may be after the entry of any such caveat, the Registrar shall serve upon the proprietor of the land and any person or body having a registered interest in the land thereby affected a notification in Form 19A.

(3) A Registrar's caveat shall continue in force until it is cancelled by the Registrar —

E (a) *of his own motion; or*

(b) *on an application in that behalf by the proprietor of the land affected; or*

(c) *pursuant to any order of the Court made on an appeal under* section 418 *against his decision to enter the caveat, or his refusal of any application for its*
F *cancellation under paragraph (b).*

(4) Where the Registrar effects a cancellation under sub-section (3), the Registrar —

(a) *if he is acting under paragraph (a) of that sub-section, shall notify the proprietor of the land and any person or body having a registered interest in the land affected; and*
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(b) *in all cases, shall make a note under his hand and seal of the date of the cancellation.*

[27] In the Privy Council case of *Registrar of Titles, Johore v Temenggong*
H *Securities Ltd* [1976] 2 MLJ 44, Lord Diplock held as follows:

In determining whether or not to exercise the power conferred upon him by the section, the Registrar can only act upon such information as is available to him. This will consist of what is entered in the register itself or filed in the registry, together with such additional information as may have been supplied to him by whoever has
I requested him to exercise his power to enter a registrar's caveat.

[28] Subsequently in the Federal court case of *Taipan Focus Sdn Bhd v Tunku Mudzaffar b Tunku Mustapha* [2011] 1 MLJ 441; [2011] 1 CLJ 133, Raus Sharif FCJ (now CJ) held as follows:

[17] Section 319 of the Code provides that a registrar's caveat may be entered by the registrar on the register document of title to any land in any of the circumstances specified in s 320 of the same. Section 320 provides a registrar's caveat may be entered in respect of any land wherever it appears to the registrar to be necessary or desirable, inter alia, for the prevention of fraud or improper dealing. Section 417 of the same provides the court or a judge may by order direct the registrar or any land administrator to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of registrar or land administrator to comply with the order forthwith.

[29] In the circumstances here based on the grounds as stated in Form 19F of the NLC dated 2 October 2014, there is in my view reasonable ground for the entry of the registrar's caveat in the land. A deceased person could not have executed instruments of transfer of the land subsequent to her death as had happened here. Several of the transfers benefitted several of the plaintiffs making them now registered proprietors. Unless satisfactory explained, this prima facie smacks of fraud or improper dealing.

[30] I am aware that in the Supreme Court case of *Pendaftar Hakmilik Negeri Kedah v Oversea-Chinese Banking Corp Ltd* [1991] 2 MLJ 177; [1991] 2 CLJ 1105, Gunn Chit Tuan SCJ (later CJ (Malaya)) held as follows:

... In this case, the registrar had decided to enter the registrar's caveat against the land in question without all those information on several material matters which need to be considered by him before he decided to enter the registrar's caveat.

He had therefore not exercised his discretionary powers according to and within the limits set out in the provisions of s 320(1)(ba) of the National Land Code because he had failed to take relevant considerations into account. As he has not acted judiciously or reasonably within the ambit and scope of that section, he has therefore exceeded his powers under that section and has therefore acted ultra vires and his act was therefore invalid ...

[31] In my view, the land administrator had acted within his jurisdiction as well as judiciously and reasonably in maintaining the registrar's caveat in the land pending the completion of police investigations on the seemingly fraudulent or improper transfer of ownership in the land. In *Agrimal Project Sdn Bhd v Pendaftar Hakmilik, Pejabat Tanah Dan Galian, Johor & Ors* [1998] 5 MLJ 673, Abdul Malik Ishak J (later JCA) held as follows:

Applying these authorities to the facts of the present case, the information that was relayed by the police (the fourth defendant) to the registrar (the first defendant) as adumbrated in the early part of the judgment constituted in law sufficient material for the registrar to exercise his discretion to enter the registrar's caveat which should remain until investigations had been completed by the police. So long as there is propriety — just like in the present case — the registrar was justified in entering the registrar's caveat on those pieces of land. At this stage, there was no necessity for evidence of the most severe impropriety to appear so as to warrant the entry of the

registrar's caveat. As Wan Hamzah SCJ said in the case of *Leong Seng Kiat v Khaw See Song* [1988] 2 MLJ 365, where fraud and forgery were claimed, 'the question of forgery and fraud is an issue which should be thrashed out at the trial where all the relevant evidence would be adduced'.

[32] The plaintiffs must therefore establish that their acquisition of the land has been lawful, otherwise their registered co-ownership is defeasible pursuant to s 340(2)(a) or (c) and/or (4) of the NLC. In the premises, the plaintiffs in my view either have to await the completion of the police investigations in their favour or they have to otherwise file a civil action in court to declare that they are the lawful registered proprietors of the land. The plaintiffs have not averred in their affidavit that the police investigations had concluded the investigations in their favour. In this sense the case of *Kiu Su Sieng & Ors v Registrar of Lands and Surveys Kuching Division* [2016] 11 MLJ 376; [2016] 2 CLJ 959 relied by the plaintiffs is in my view distinguishable on the facts. Alternatively the plaintiffs have also not yet initiated the aforesaid civil suit. The filing of the OS here is thus premature.

[33] As the result, the competing ownership of the land by Marlia bt Mohd Belia who claimed to be entitled as beneficiary of the estate of the Mariam bt Yahaya that had been twice struck off is hence irrelevant for the purposes herein. Consequently, the case of *Motif Unik Sdn Bhd v Khoo Ah Soon & Anor* relied upon by the plaintiffs where the registrar's caveat was removed consequential to the failure of the third party challenge is also distinguishable on the facts.

[34] In the premises, I am not satisfied that the registrar's caveat ought to be removed on the present prevailing facts and circumstance herein.

CONCLUSION

[35] It is for the foregoing reasons that I dismissed the OS as so ordered.

Plaintiffs' action dismissed with costs of RM1,000.

Reported by Dzulqarnain Ab Fatar